Supreme Court, U. S.
FILED
MAR 4 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1228

KURT SCHMIEDER,

Petitioner,

v.

LOUIS H. HALL, JR., as Executor of the ESTATE OF HELEN B. DWYER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Kurt Schmieder, petitioner herein, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered September 20, 1976, affirming the judgment and orders of the United States District Court for the Southern District of New York.

JURISDICTION

The judgment of the court below was entered on September 20, 1976. Timely petition for rehearing and suggestion for rehearing *en banc* was filed, and denied on November 8, 1976. An extension of time to file Petition for Writ of Certiorari to and including March 4, 1977 was granted on January 27, 1977. Jurisdiction to review this judgment is conferred on this Court by Title 28, Section 1254, of the United States Code.

OPINIONS BELOW

The opinion of the court below has not been reported, and is appended as Appendix A. Orders denying rehearing and rehearing *en banc* are appended as *Appendix B* and *Appendix C*. The opinions of the United States District Court for the Southern District of New York are appended as *Appendices D* through *K*. The opinion of the trial court dated September 25, 1975, and its memorandum and order dated March 12, 1976, are reported at 421 F. Supp. 1208 and 421 F. Supp. 1218, respectively.

QUESTIONS PRESENTED

1. Does the Trading with the Enemy Act take away the right of a German national, long after the cessation of hostilities, to bring an *in personam* action not vested as enemy property for fraud, seeking imposition of a constructive trust?

2. Does the return by the United States Government of property seized under the Trading with the Enemy Act to a person who acquired it by reason of fraud and overreaching on the part of an American attorney-at-law wipe out all the defrauded party's rights to sue the person receiving the fruits of the fraudulent behavior?

3. Can the Federal Executive cut off all rights of a former enemy to bring legal action, long after the cessation of hostilities and the operation of the Trading with the Enemy Act, to invoke the power of equity of the federal courts for redress of a wrong *in personam*, rather than the enforcement of a property interest, when the vesting order does not by its language even purport to seize such right?

4. Where a common law gift was not made, but rather an absolute transfer without consideration and without donative intent, to the secretary of the transferor's attorney who professionally advised the transfer and supervised the disposition of the funds, does an equitable duty exist requiring the secretary to repay the amount of unjust enrichment, after the purpose of transfer has been accomplished?

5. Can the Trading with the Enemy Act be used by one receiving property as the result of fraud and overreaching as a means of insulating him from any equitable duty?

6. Can the secretary of an attorney-at-law, who by reason of his fiduciary relationship causes a client to transfer property to her, avoid accountability for the fruits of the poisonous tree?

7. Does the federal common law doctrine against windfall abuse prevent the return of property vested under the Trading with the Enemy Act to persons other than those found entitled thereto by law?
dicially determined?

8. Does the closing of the federal courts to the *in personam* fraud claim of a former enemy national, not seized by the United States Government, against an individual, constitute a violation of the due process clause of the Fifth Amendment to the Constitution of the United States?

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

Sections 5(b)(1) and 7(c) of the Trading with the Enemy Act (50 U.S.C. Appendix §§ 5(b)(1) and 7(c)), and Article 5 of the Bill of Rights are set forth in *Appendix L.*

STATEMENT OF THE CASE

Petitioner, a German national, inherited property from his family, consisting of business interests in the United States, where petitioner had spent years. He was living in the part of Germany which after World War II became Russian-occupied territory until he succeeded in escaping to West Germany in 1951. Prior to that he was persecuted and imprisoned in East Germany for so-called economic sabotage, and prior to and during World War II was persecuted by the Nazis by reason of his outspoken opposition to the Nazi creed and his membership in an opposition political group.

In the nineteen thirties, in order to avoid the use of his American assets by the Nazis, he concealed his ownership through the use of nominees, at great risk to himself. In 1938, his American attorney, one Louis H. Hall, Sr., recommended to him that he divest himself of all interest in the property, and recommended his secretary, whom petitioner had never met and with whom he had no contact or relationship whatever, as transferee. At

the time, petitioner could have transferred the property to Switzerland and other countries, or even disclosed it to the German authorities without penalty. However, petitioner, without any consideration, transferred all his property in the United States to the secretary, on the oral understanding with Mr. Hall that his rights would be recognized whenever the purpose of the transfer was accomplished. At the end of 1948, the United States Government vested the specific property under the Trading with the Enemy Act, and the secretary filed claim for the return of the property, and a court action in the United States District Court for the District of Columbia for that purpose. She was then represented by Mr. Hall's law firm. She filed a motion for summary judgment, and Judge Alexander Holtzoff wrote an opinion denying the motion, stating that:

"[i]f the case were on trial before me, I should be inclined to hold on the undisputed evidence that the plaintiff has no beneficial title. Here is a stenographer in an office who gets an assignment of property of a client of the office of a value of $200,000. She does not know the original donor. She does not use the property or spend any of it. There is some inference to be drawn that she is only a straw. That is no reflection on her. As a matter of fact, there is nothing reprehensible in being a straw, but there is serious question in my mind whether she has a beneficial interest in that property. . . . The reason or motive is not important. What is important is whether there was an intention to vest a beneficial interest in the plaintiff without any understanding whatsoever of the principals that she was to hold it for the benefit of the prior

owner [Kurt Schmieder], or that she was to return it to the prior owner. That is the question. . . . I think there is a material issue of fact as to whether the plaintiff is the beneficial owner of this property and that cannot be determined as a question of law."

That opinion was issued in the face of a statement Mr. Hall had sent to East Germany in June 1948 for petitioner to sign, indicating an absence of any claim on his part in regard to the property. Petitioner, in reliance on Mr. Hall's advices, had no hesitancy in signing this, and could in any event make no inquiries from East Germany, which also had stringent laws prohibiting the ownership of foreign assets.

Subsequently, on the eve of trial, the action was dismissed, and outside the court record the parties entered into an extra-judicial settlement under which the secretary received fifty-five percent of the property vested.

Following the petitioner's release from prison and escape from East Germany, he made inquiry with the son of Mr. Hall, who had died in 1949, as to the status of the property and the whereabouts of the secretary, but received no information. The son was a member of the same law firm as his father, and the secretary continued to serve as his personal law secretary until 1953, when she retired.

In 1967, petitioner discovered the whereabouts of the secretary through his own efforts, and asked her for an accounting. This was rejected in her behalf by a former partner of the law firm.

Respondent, with his sisters, is a principal beneficiary of the secretary's property under a will and trust, and is the executor of her will. He was substituted for her as defendant following her decease in May 1970. He filed

a number of motions for dismissal and summary judgment, all of which were denied, as per opinions appended as *Appendices D* through *F*. At trial, the court found in favor of respondent, and on appeal the judgment was affirmed. Post-trial motions by petitioner were denied, and a second action was dismissed on grounds of *res judicata*, all of which dispositions were also affirmed on appeal.

REASONS FOR GRANTING THE WRIT

This Court has held that under the federal common law, the Trading with the Enemy Act cannot be used as a means of permitting a windfall to a person who is not entitled equitably to it, simply because the Act barred an action by the technical enemy. *Ex Parte Kawato*, 317 U.S. 69.

What the court below has done is allow the heirs of an American attorney, who advised a German national that rather than use other means available to protect his American interests he should transfer them to his secretary, to benefit by the attorney's violation of his fiduciary duty. The dismissal of petitioner's action was based on the Trading with the Enemy Act, which the trial court held to have deprived petitioner of standing to bring the action. Although there have been holdings that where property is vested under the Act, and thereafter sold to third parties, no right of action exists against the purchaser, there is no case where this doctrine has been invoked in an *in personam* action against the person in whose possession the property was vested, who could in no sense be considered a *bona fide* purchaser, and was not the recipient of a common law gift, there being no donative intent.

After having dismissed the action on the ground of standing, the trial court proceeded to pass on the merits, holding that petitioner had not satisfied his burden of proof that the secretary was a party to a 1938 conspiracy to defraud petitioner, and without this, the action must fail. According to this, by placing the property in the hands of his secretary rather than himself, the attorney has apparently succeeded in insulating it from any attempt on the part of petitioner to reclaim his property, even though the ultimate beneficiaries of the property are the children of the attorney, rather than the members of the secretary's family.

What this holding does is to grant a license to attorneys to steal clients' property, provided they find a straw party as to whom it is not possible for the client to show direct involvement in the planning of the wrongdoing. This Court has been zealous in upholding a high standard of fiduciary responsibility on the part of attorneys in their dealings with clients, so as to avoid even the appearance of conflict of interest. The holding of the court below, particularly in the face of the opinions of Judge Holtzoff of the United States District Court for the District of Columbia, and three judges of the United States District Court for the Southern District of New York indicating that the admitted absence of any consideration or donative intent created a strong presumption of wrongdoing, runs counter to the clear position of the Court.

Further, the position of the Court in reducing federal technical defenses on the ground of standing, except where expressly stated by Congress, runs counter to the holding of the court below. Nothing in the Trading with the Enemy Act requiring a denial of standing was pointed out by the court below, and none exists, especially as to private actions not involving the Federal Government.

The position of the United States, in expressing what it considers the interest of the Federal Government, is quite unusual. Rather than supporting an effort to uncover and provide relief for what is obviously an overreaching on the part of a member of the bar, it suggests that ratification of its settlement with the respondent is in the public interest.

The holding of the court below runs counter to the position of the United States Court of Claims in *Gmo. Niehaus & Co. v. United States,* 153 F. Supp. 428, holding, under the authority of the decisions of this Court in *Miller v. United States,* 11 Wall. 268 and *Silesian-American Corporation v. Clark,* 332 U.S. 469:

> "The doctrine of these cases is that an enemy does not lose his substantive rights in property, merely because of the existence of war, or as a result of a physical act of seizure by persons purporting to act for the Government, unless there is an applicable statute declaring automatic forfeiture or authorizing seizure."

While general vesting authority existed in the present case, there was no statutory authority for the forfeiture of rights of petitioner. The Federal Government, having full knowledge prior to the issuance of the vesting order of the same facts later before Judge Holtzoff when he found the inference flowing from them, including the 1948 statement of petitioner, determined to issue a vesting order finding the property to be that of petitioner, and then after vesting, the opinion of Judge Holtzoff, and dismissal of respondent's suit, proceeded to return to respondent by an extra-judicial settlement the majority of the property subject to the vesting order. Petitioner learned only fortuitously of the partial return of the property.

Under the *Kawato* doctrine, a limitation attaches to the authority of the United States Government when it vests property, that it shall either be retained by the Government, or returned to the person who is entitled to receive it. Thus, instead of suggesting that it is in the interest of the United States that the settlement with respondent be upheld, as the Federal Government has done here, it is submitted that it should have suggested that the interest of the Government was that a windfall be avoided, and that the court determine either that the property should go to petitioner or be retained by the Government as enemy property.

While perhaps the Justice Department has an interest in defending a settlement which it made in the face and disregard of the strong position as expressed by Judge Holtzoff, based on facts substantially identical with those adduced at trial, including petitioner's 1948 statement, it is submitted that it should feel a stronger responsibility to protect both the public interest and that of the bar in preserving its integrity.

CONCLUSION

For the above reasons, it is suggested that this case is one calling for the exercise of the authority of the Court in maintaining the standards of behavior of the bar, as well as supervising the basic responsibilities of the lower federal courts, in accordance with the position taken by the Court in the maintenance of those standards and responsibilities. Further, the question of the treatment of foreign nationals friendly to this country in the federal courts is one of importance, which should call for review.

Petitioner would point out that a companion action has been pending in the United States District Court for the District of Massachusetts since 1971, at which time petitioner learned through the probate proceedings involving the secretary's will of the existence of an *inter vivos* trust established by the secreta · after the petitioner had traced her whereabouts, comprised of five-sixths of her property, in which the children of Mr. Hall were exclusive beneficiaries. This discovery was subsequent to the filing of the present action in 1969. The Massachusetts action aims at the impression of a constructive trust on the trust property, and is directed against Hall, Jr., individually, and as executor of the secretary's estate, and against his two sisters and the trustees. Multi-district litigation rules were not applicable, and petitioner applied to have the New York litigation kept dormant until the Massachusetts case, where all parties and issues were before the court, was decided. Respondent opposed, and the application was denied. A motion by respondent and his two sisters for summary judgment has been filed in Massachusetts.

In the Massachusetts court, the action is based on the obligation of Hall, Jr., as an attorney, so that the defense on the basis of which the New York courts found against

petitioner on the merits, the failure to satisfy the burden of proof that the secretary was a party to a conspiracy, does not apply, since as to lawyers the burden is reversed.

In the interest of procedural economy, it is suggested that the present petition be held in abeyance until the determination of the Massachusetts action, since only then can the total impact of this case on the public interest be fully appreciated.

Respectfully submitted,

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